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No. _____

In the Supreme Court of the United States

October Term, 1985

GLENN R. DOBEY & JUANITA M. DOBEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Do the statutes purportedly conferring jurisdiction to try misdeameanors on the Magistrate, 28 U.S.C. §636(a)(3) and 18 U.S.C. §3401, violate Article III of the Constitution of the United States?

PARTIES

Glenn R. Dobey, Juanita M. Dobey and the United States of America are the parties to this appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Glenn R. Dobey and Juanita M. Dobey, husband and wife, respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit from which a writ of certiorari is sought is reported at 751 F2d 987 (CA10, 1985). That decision affirmed the decision by the United States District Court for the District of New Mexico, Juan G. Burciaga, Judge, which affirmed Petitioners'

judgments of conviction entered on jury verdicts by United States Magistrate David Gallagher, before whom Petitioners were tried.

JURISDICTION

Tne decision and order for which review is sought was entered by the Clerk of the Court of Appeals January 8, 1985. A Petition for Rehearing *en banc* was denied by order entered February 11, 1985. This petition is being filed within 60 days of that order in compliance with Supreme Court Rule 20.1 and no extension of time for filing this Petition has been sought. Jurisdiction of this Court is therefore invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 636(a)(3) of Title 28, United States Code, provides:

> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by this appointment --
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

Section 3401(a) and (b) of Title 18, United States Code, provides:

> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, mis-

demeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

Petitioners, husband and wife, were charged by an Information alleging willful failure to file federal income tax returns for the calendar years 1978 and 1979, in violation of 26 U.S.C. §7203. (RT p. 17 1.16 - p. 20 1.13). After both petitioners signed forms consenting to be tried by a Magistrate their trial to a jury was conducted in the United States District Court for the District of New Mexico, Albuquerque, New Mexico, before the Honorable David R. Gallagher, United States Magistrate, commencing January 24, 1983, and continuing daily to its conclusion January 27, 1983, when the jury returned verdicts of guilty on both counts against both defendants. (RT p. 634 1.25 - p. 635 1.11). Petitioners were each sentenced to one year of imprisonment, five years probation following service thereof, and fines of $2,000.00. Petitioners appealed to the District Court.

During the pendency of that appeal the Ninth Circuit decided *Pacemaker v. Instromedix,* 712 F2d 1305 (CA9, 1983), which held that trials could not be conducted before United States Magistrates because they lack the attributes of Article III Judges. On February 16, 1984, the Ninth Circuit reversed the previous *Pacemaker* panel decision by an 8-3 vote. Id., 725 F2d 537. In the instant case the District Court affirmed, indicating that *en banc* reversal of *Pacemaker* nullified it's precedential value. While *Pacemaker,* a civil case, was pending before the Court *en banc,* a panel of the Ninth Circuit decided *United States v. Woodley,* 726 F2d 1328 (CA9, 1983). *Woodley,* concerned a *criminal* case tried before a recess appointee judge. The panel reversed the conviction because the trial judge lacked the Article III protections to guarantee impartiality. Even assuming that a Magistrate can be impartial in a civil trial involving private litigants, a criminal trial involving the United States as a Plaintiff should not be conducted before a tribunal lacking Article III status. However, in *United States v. Woodley,* 751 F2d 1008 (CA9, 1985) the Ninth Circuit reversed the panel and reinstated Woodley's conviction.

The Petitioners' appeal followed to the Tenth Circuit after affirmance by the Honorable United States District Judge, Juan G. Burciaga, of Petitioners' convictions.

Petitioners contend that their trial was a nullity since, unbeknownst to any of the parties, the statutes purporting to confer jurisdiction on the magistrate violate Article III of the Constitution of the United States (hereinafter "ART III") and their purported consent and waiver was signed without any reference to or knowledge of ART III.

On January 8, 1985, the panel composed of Circuit Judges Barrett, Breitenstein and Seymour filed its un-

animous opinion affirming the convictions of Glenn Dobey and Juanita Dobey, husband and wife, for misdemeanor violations of 26 U.S.C. §7203, willful failure to file income tax returns. *United States v. Dobey*, 751 F2d 1140 (CA10, 1985). That opinion relied entirely on the fact that Mr. and Mrs. Dobey had signed standardized forms prepared by the District court waiving their rights to trial before a district judge. 751 F2d 1140, 1141.

After quoting the pertinent statutes, 28 U.S.C. §636(a)(3) and 18 U.S.C. §3401, the panel opinion states:

> It is uncontested that the Dobeys voluntarily consented to be tried by the Magistrate and they voluntarily waived trial before the district court. The Dobeys do not contend that the magistrate failed to adhere to the provisions of 18 USC §3401 in informing them of their rights to trial before the district court. On appeal the Dobeys' sole allegation of error is that the statutes, §§636 and 3401, purportedly conferring criminal trial jurisdiction on the magistrate, violate Article III of the United States Constitution.
> *751 F2d 1140, 1141-42.*

Contrary to the Court's statement, it was *not* "uncontested that the Dobeys voluntarily consented to be tried by the magistrate and that they voluntarily waived trial before the district court (sic)". Furthermore, contrary to the appellate panel's assertion, the Dobeys *do* — "contend that the magistrate failed to adhere to the provisions of 18 USC §3401 in informing them of their right to trial before the district court (sic)." To correct these two misstatements of fact, the undersigned repeats what was stated at oral argument: (1) it is uncontested that the Dobeys *signed the waiver forms;* and, (2) no record exists of any advisement given to the Dobeys. The appel-

late court's holding that the signatures on the waiver forms without more constitute 1) voluntary consent to be tried by the magistrate and 2) waiver of the right to be tried by an Article III *judge* contradicts the criteria for waiver set forth in *United States v. Dressel*, 742 F2d 1256 (CA10, 1984). The Dobeys *did* contest the "voluntariness" of their consents and waivers; they *do* also "contend that the magistrate failed to adhere to the provisions of 18 USC §3401," which provides, in pertinent part:

> The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a *judge* of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.
> *18 USC §3401(b).*

As the undersigned stated at oral argument, unless the words "carefully explain" and "after such explanation" are mere surplusage, the magistrate is obligated to explain that there is a difference between a magistrate and a judge, i.e. the latter enjoys the protection of Article III's tenure and salary guarantees while the former does not. The government conceded at oral argument that there was no record of the explanation required by the statute. In its concluding paragraph the panel opinion further embellishes upon the "uncontested", "voluntary" waiver:

> As set forth, *supra,* it is uncontested that the Dobeys voluntarily consented

> to trial before the magistrate and knowingly waived their right to trial before the district court . . . Inasmuch as the Dobeys consented to trial before a specifically designated magistrate and knowingly waived their right to trial before an Article III judge, their convictions are not void for lack of jurisdiction.
> *751 F2d 1140, 1143 (CA10, 1985).*

In this concluding paragraph the panel opinion compounds the erroneous premise that the Dobeys' signatures without more constitute *voluntary* consents and waivers by gratuitously adding that the Dobeys "*knowingly* waived their right to trial before an Article III judge." (emphasis added). "Knowingly" and "voluntarily" are not synonymous in this case, particularly since it is uncontested that no one ever brought Article III to the Dobeys' attention until counsel undersigned did so, long after the waiver-consent forms were signed. According to Black's Law Dictionary, Revised 4th Edition, "knowingly" means "with knowledge; consciously; intentionally; and knowledge must be actual, not merely constructive". In this case, it is uncontested that the Dobeys were ignorant of Article III's provisions and the status of judges and magistrates relative thereto.

In *United States v. Dressel,* 742 F2d 1256 (CA10, 1984), the defendant contended on appeal that his attorney's joint representation of himself and his co-defendant at trial deprived him of his constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment. Rather than relying upon the mere fact that a waiver was executed as the panel did in *Dobey,* the panel in *Dressel* thoroughly analyzed the district court's conduct of the hearings on defendant's waiver in the context of the well-settled criteria for "an effective waiver (of a constitutional right)":

> 'A waiver is . . . an intentional relinquishment or abandonment of a known right or privilege.- *Johnson v. Zerbst*, 304 US 458, 464, 58 S.Ct. 1019, 1023, 82 LEd 1461 (1938). This standard was refined in *Brady v. United States*, 397 US 742, 90 S.Ct. 1463, 25 LEd2d 747 (1970), where the Court held that '[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' . . .Notwithstanding the trial court's compliance with all of the suggested procedures to ensure that any waiver is fully informed and voluntary, under some circumstances 'even full disclosure and consent . . . may not be an adequate protection.' 742 F2d 1256, 1258.

Yet in the instant case there was no discussion nor even any mention of ART III by the district court nor is there any evidence that the trial court advised the Dobeys of Article III to ensure their "awareness of the relevant circumstances and likely consequences" of their waiver of an ART III judge. There was no "full disclosure"; furthermore,

> . . .for the waiver to be effective the court must personally address each of the defendants, informing them of the possible hazards of being represented by a single attorney and of their right to separate representation. . . The defendant must be free to ask the court questions regarding the nature and consequences of his legal representation.

> 'Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's *possible conflict of interest and potential perils of such a conflict, that he has discussed the matter with his attorney* or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. F.R.Crim.P. 44(c) advisory committee notes (quoting *United States v. Garcia*, 517 F2d 272, 278 (CA5, 1975).
> *742 F2d 1256, 1258).*

In the instant case neither the district court nor the magistrate ever advised the Dobeys of the magistrate's "possible conflict of interest and the potential perils of such a conflict. . .". No explanation has been proffered for the lesser protection provided against judicial conflicts of interest compared to defense counsel conflicts of interest. The Dobeys submit that waivers of Article III protection require the same careful attention as waivers of Sixth Amendment protection.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17(c) provides that:

> . . .The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> When a . . . federal court of appeals has decided an important question of federal law which has not been, but

> should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners submit that: 1) the jurisdiction of magistrates to conduct misdemeanor trials is an issue requiring final resolution by this Court involving many thousands of cases nationwide, 2) this important question of federal law has not been, but should be, decided by this Court, and 3) the decision of which Petitioners seek review in this Court is apparently in conflict with this Court's decision in *United States v. Raddatz*, 447 US 667, 65 LEd2d 424, 100 S.Ct. 2406 (1980).

28 USC §636(a)(3) provides:

> Each United States Magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

The pertinent portions of 18 USC §3401, being subsections (a) and (b), provide:

> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

> (b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

Neither the Dobeys nor Donald W. MacPherson, Esq., their trial counsel, were aware that Magistrates lacked the attributes of ART III Judges. Likewise, their undersigned counsel on appeal did not become aware of the potential jurisdictional defect until publication of the opinion of the United States Court of Appeals for the Ninth Circuit in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 712 F2d 1305, decided August 5, 1983, which vacated a civil judgment entered by a Magistrate after the parties had stipulated to trial before the magistrate, who lacked the life tenure and salary protection mandated by Article III of the United States Constitution. The panel's decision was reversed by that Court *en banc* on February 16, 1984, 725 F2d 537. The *en banc* majority opinion has limited relevancy to the instant case because of the following qualifying language:

> At the outset, and *leaving aside all consideration of criminal cases,* we recognize the principle that parties to a case or controversy are entitled to

> have the cause determined by Article III judges, with some significant exceptions yet to be fully delineated by the Supreme Court. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 US 50, 102 S.Ct. 2858, 73 LEd2d 598 (1982).
> (emphasis added)
> *Pacemaker*, 725 F2d 537, 541.

The *en banc* dissent in *Pacemaker* provides a useful analytical framework for this jurisdictional challenge:

> The majority bases its holding on three well-meaning but fundamentally misguided assumptions. The first assumption is that under one constitutional system the exercise of the judicial power of the United States by Article III judges can depend upon stipulations of the litigants. The second is that magistrates, who operate under the thumb of district court judges and whose salaries are not protected from retaliatory diminution by Congress, have the independence the Constitution is designed to ensure. The third is that consent to use of a magistrate can be presumed to be voluntary when the explicit purpose of the consensual reference provision of the Magistrates Act was to encourage certain classes of litigants to abandon their right to Article III adjudication because existing overburdened district judges could not hear all cases promptly.
> *725 F2d 537, 547.*

Whether jurisdiction to conduct a criminal trial can be conferred on a magistrate is a question of first impression in the appellate courts of the United States.

The cases closest to that at bar in terms of the issues presented are *United States v. Raddatz*, 447 US 667, 65 LEd2d 424, 100 S.Ct. 2406 (1980) and *United States v. Woodley*, 751 F2d 1008 (CA9, 1985). The latter was an *en banc* reversal by a 7-4 vote of the Ninth Circuit of a panel decision, *United States v. Woodley*, 726 F2d 1328 (CA9, 1984), vacating a criminal conviction and judgment entered by a "recess appointee judge."[1] Circuit Judge Beezer's majority opinion in *Woodley*, supra, *en banc* held in pertinent part:

> The language of the recess appointment clause explicitly provides that the President has the power to fill *all* vacancies during the recess of the Sentate. The Federalist papers clarify the meaning of the recess clause, stating that it 'is to be considered as supplementary to the [clause] which precedes' and that the vacancies referred to 'must be construed to relate to the "officers" described in the preceding [clause].' The Federalist No. 67, at 455 (A. Hamilton) (J. Cooke ed. 1961). The preceding clause in question provides in relevant

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[1]The recess appointment clause provides that: "The President shall have Power to fill all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of the next Session." U.S. Const. Art. II, §2, cl. 2. Article III, in turn, provides in relevant part that: The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III, §1.

> part that the President 'shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States . . .' U.S. Const. Art. II, §2, cl. 2 (emphasis added by Court of Appeals) . . . Alexander Hamilton's statement that '[a]s to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general . . .' The Federalist No. 78, supra, at 522. The United States Supreme Court has noted that '[t]he opinion of [the Federalist] has always been considered as of great authority . . . and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.' *Cohens v. Virginia*, 19 US (6 Wheat) 120, 187, 5 LEd 257 (1821).

In *Raddatz*, supra, this Court delineated the outer limits of United States magistrates' jurisdiction to conduct pre-trial hearings in criminal cases, sustaining the magistrates' jurisdiction based on the rationale that magistrates' rulings were subject to *de novo* review by the district court. The case at bar raises the issue of whether a United States magistrate may exercise ART III jurisdiction to conduct a criminal trial without any *de novo* review as the recess appointee judge did in *Woodley*, supra. The critical distinction between *Woodley* and the instant case is that in *Woodley* the jurisdiction of the recess appointee judge derives from "an express constitutional grant of authority," 751 F2d 1008, 1012, whereas the jurisdiction of United States Magistrates constitutes "an impermissible statutory methodology, unsupported by an express constitutional

grant of authority". Id., at 1011, 1012. This case, then, is analogous to the recent decision of this Court in *INS v. Chadha*, 462 US 919, 103 S. Ct. 2764, 77 LEd2d 317 (1983) which teaches that even historical consensus cannot save an unconstitutional practice. The *Dobey* case is like *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 US 50, 102 S.Ct. 2858, 73 LEd2d 598 (1982) in "that Congress may not, through a statute, constitutionally vest the non-Article III adjunct bankruptcy judges with article III powers. Id. at 87, 102 S.Ct. at 2880. (The Dobeys submit that magistrates are identically situated for purposes of this analysis.) Yet, the present case (*Woodley*) is not concerned with an attempt to circumvent Article III by statute, but with the scope of an express constitutional provision." *Woodley*, 751 F2d 1008, 1013.

The *Woodley* majority opinion further elaborates on the essential distinction between recess appointees and magistrates:

> A recess appointee lacks life tenure and is not protected from salary diminution. As a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed. Yet our Constitution has bestowed upon the Executive the power to make interim judicial appointments. This power is not unfettered, however, but is subject to its own limitations and safeguards. It may only be invoked when the Senate is in recess, and recess commissions expire at the end of the next Congressional session. U.S. Const. Art. II, §2, cl. 3; see *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979). We must therefore view the recess appointee not as a

> danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of article III.
> *751 F2d 1008, 1014.*

The Dobeys submit that the majority opinion in *Woodley* provides powerful support for the argument that their convictions are void, since magistrates lack any "express constitutional provision" for exercising ART III jurisdiction. The scholarly exegesis contained in the *Woodley en banc* dissent applies *a fortiori* to magistrates. That dissenting opinion, written by Circuit Judge Norris, prefaces its "four-step inquiry" in pertinent part as follows:

> My major point of disagreement with the majority is its reliance upon the executive's practice of making recess judicial appointments. . . Because of its uncritical acceptance of the historical practice as determinative of the constitutional issue, the majority fails to make any serious comparative analysis of the concerns for governmental efficiency underlying the Recess Appointments Clause and the principle of judicial independence underlying the tenure and salary provisions of Article III.
>
> We need only look to recent history to appreciate that there is genuine tension between the values underlying the two opposing constitutional provisions. President Eisenhower's recess appointments to the Supreme Court of Chief Justice Earl Warren in 1953 and Justice Brennan in 1956 both created controversy about the

legitimacy of recess appointments to that Court. Senator Joseph McCarthy's public interrogation of Justice Brennan while the latter was a sitting Justice of the Court tells its own cautionary tale:

Senator McCarthy. You, of course, I assume, will agree with me and a number of the members of the Committee — that communism is not merely a political way of life, it is a conspiracy designed to overthrow the United States Government.

Mr.Brennan. Will you forgive me an embarrassment, Senator. You appreciate that I am a sitting Justice of the Court. There are presently pending before the Court some cases in which I believe will have to be decided the question of what is communism, at least in the frame of reference in which those particular cases have come before the Court.

I know, too, that you appreciate that having taken an oath of office, it is my obligation not to discuss any of those pending matters. With that qualification, whether the label communism or any other label, any conspiracy to overthrow the Government of the United States is a conspiracy that I not only would do anything appropriate to aid suppressing, but a conspiracy which, of course, like every other American, I abhor.

> Senator McCarthy. Mr. Brennan, I don't want to press you unnecessarily, but the question was simple. You have not been confirmed yet as a member of the Supreme Court. There will come before the Court a number of questions involving the all-important issue of whether or not communism is merely a political party or whether it represents a conspiracy to overthrow this Government.
>
> I believe that the Senators are entitled to know how you feel about that and you won't be prejudicing then any cases by answering the question.
>
> Hearings Before the Senate Committee on the Judiciary on the Nomination of William Joseph Brennan, Jr.: 85th Cong., lst Sess., 17-18 (1957). *751 F2d 1008, 1015.*

The first two of the four-step inquiry concern the constitutional text and contemporaneous writings of the Framers as they pertain to the two clauses in question. The fourth step considers the specific practice of making recess judicial appointments as a factor in deciding the constitutionality of that practice. Since the instant case concerns only Article III and no other constitutional provision we confine this discussion to the third step of Judge Norris' analysis: "Constitutional Values and their role in constitutional interpretation."

> The Supreme Court has consistently observed the principle that in interpreting the Constitution, we are to be mindful of the concerns that animate

its various provisions. See e.g., *Virginia v. Tennessee,* 148 US 503, 519, 13 S.Ct. 728, 734, 37 LEd 537 (1893); *Legal Tender Cases,* 79 US (12 Wall.) 457, 531, 20 LEd 287 (1870); *Gibbons v. Ogden,* 22 US (9 Wheat.) 1, 187, 6 LEd 23 (1824). The classic statement was provided in *Prigg v. Pennsylvania,* 41 US (16 Pet.) 536, 10 LEd 1060 (1842:

'It will, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications, in its actual application to particular clauses. And, perhaps, the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed . . . If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its

> just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.
> *751 F2d 1008, 1020.*

Judge Norris cites *Pacemaker v. Instromedix*, supra *en banc*, for the proposition that:

> The attributes of Article III judges, permanency in office and the right to an undiminished compensation, are as essential to the independence of the judiciary now as they were when the Constitution was framed.

This Court stressed the necessity for Article III safeguards to judicial independence in *Northern Pipeline v. Marathon Pipeline Co.*, 458 US 50, 102 S.Ct. 2858, 73 LEd2d 598 (1982):

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.
> *Id. at 60, 102 S.Ct. at 2866.*

The provisions herein at issue, 28 USC §636(a), of the Magistrates Act, 28 USC §§631-639 (1976, 1979, and Supp. V, 1981) authorize the judicial branch to create new judicial offices, appoint those who will occupy the offices, and then delegate to appointees the authority to exercise the criminal judicial power of the United States. The Act thereby violates the doctrine of separation of powers. In the words of James Madison:

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.
> *The Federalist,* No. 48, at 332 (J. Cooke ed. 1961).

On the same topic Alexander Hamilton wrote:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations. . .can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
> *The Federalist,* No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961).

In *Wharton - Thomas v. United States,* 721 F2d 922 decided November 23, 1983, the Third Circuit considered the identical question presented in *Pacemaker,* holding as did the Ninth Circuit *en banc* that a civil case could be tried before a Magistrate with all parties' consent without offending Article III. In a footnote the Third Circuit pointed out that:

> Although section 636(c) [of Title 28, United States Code, authorizing civil trial before Magistrates with consent] was added by the 1979 amendments to the Magistrates Act, the provision is not the first time Congress has authorized a non-Article III officer within the judicial system to exercise case dispositive authority on the consent of a party. An act passed in 1940 provided that 'any United States commissioner specially designated for that purpose by the court by which he was appointed shall have jurisdiction to try and, if found guilty, to sentence persons charged with petty offenses' committed on federal enclaves.
> *Act of October 9, 1940, ch. 785, 54 Stat. 1058-59.*

What the *Wharton-Thomas* court apparently failed to appreciate is that Article III limitations on jurisdiction have never been imposed on federal enclaves, as noted in *United States v. Raddatz,* supra, and *Northern Pipeline v. Marathon Pipeline,* supra. In his dissent in *Raddatz,* Mr. Justice Marshall states:

> It is true that a number of our decisions have recognized Congress' authority to create legislative tribunals unprotected by the tenure and salary provisions of Article III. See *Glidden v. Zdanok,* 370 US 530 at 543-552, 8 LEd2d 671, 82 S.Ct. 1459, and cases cited.
>
> . . .The rationale of our decisions involving legislative courts has been far more limited, focusing on Congress' plenary power over specialized areas of geography or subject matter. . .
> *447 US 667, 705, 65 LEd2d 424, 452.*

Justice Brennan's plurality opinion, announcing the judgment in *Northern Pipeline,* considers:

> . . .a series of cases in which this Court has upheld the creation by Congress of non-Article III 'territorial courts.' This exception from the general prescription of Article III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operates as sovereign, Congress was to exercise the general powers of government.
> *458 US 50, 64, 73 LEd2d 598, 611.*

Courts — martial and legislative courts/administrative tribunals are the other two "situations" Justice Brennan discusses as "exception(s) from the general prescription of Article III," concluding:

> In sum, this Court has identified three situations in which Article III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Article III.[25]

Footnote 25, reproduced below in its entirety, is particularly noteworthy because it includes the following:

> What clearly remains subject to Article III are all private adjudications in Federal Court within the States — matters from their nature

> subject to 'a suit at common law or in equity or admiralty' — *and all criminal matters,* with the narrow exception of military crimes.
> (emphasis added.)

If, as the footnote states, all criminal matters, with the narrow exception of military crimes, (see Justice Marshall's dissent in *Raddatz,* at 447 US 667, 706-7, 65 LEd2d 424, 452-3) remain subject to Article III, then Magistrate Gallagher lacked jurisdiction to preside at the Dobeys' trial, since 18 USC §3401 confers trial jurisdiction not subject to Article III. The pertinent legislative history of 18 USC §3401 is hereto attached. The 1940 origin of the statute is correctly noted by the Third Circuit in *Wharton-Thomas* at f.n. 6 as above cited. The first change to 18 USC §3401, in 1968, is described in relevant part, United States Code Congressional and Administrative News (USCCAN) 1968, at p. 4254:

> It gives the U.S. Magistrate an expanded trial jurisdiction over minor criminal offenses. . . . Under present law, U.S. Commissioners have trial jurisdiction over misdemeanors *committed on Federal reservations* when the offense is punishable by not more than 6 months' imprisonment or a fine of $500, or both. The magistrate's trial jurisdiction, with certain exceptions, will extend to misdemeanors, *wherever committed,* that are punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000, or both. (emphasis added)

At pages 4263 and 4264 this expansion of criminal jurisdiction is discussed both as to geography and subject matter. Proposed "Section 302" (of S.945) as the provision was called, was questioned by Assistant Attorney General Vinson at the hearings held by the Senate Sub-

committee. According to the legislative history *Id.* at p. 4264:

> Mr. Vinson expressed the opinion that only Article III judges may be empowered to conduct trials of Federal criminal offenses, including minor offenses. Magistrates, lacking good behaviour tenure and freedom from congressional salary-tampering he reasoned, are not Article III judges. They may not, therefore, be invested with the subject matter jurisdiction necessary to try minor offenses. He further suggested that defendants cannot waive subject matter jurisdiction deficiencies of the courts before which they are tried, and thus all sentences pronounced by magistrates would be constitutionally assailable.

The legislative history goes on to explain that a memorandum of law (included in the transcript of the hearings on S.3475, which was similar to S.945) was prepared which rejected Mr. Vinson's views as being contrary to the "heavy weight of authority", since the magistrates are appointed by Article III judges and "subject at all times" to their "direction and control".

Precisely that rationale, i.e. "magistrates are subject to control by Article III judges", was employed in the majority opinion by Chief Justice Burger in *United States v. Raddatz,* supra, a criminal action wherein the district judge accepted the magistrate's recommendation to deny a suppression motion based on the magistrate's assessment of the credibility of conflicting testimony without a *de novo* hearing before the Article III Judge:

> Having rejected respondent's statutory argument, we turn to his constitu-

> tional challenge. He contends that the review procedures established by [28 USC] §§636(b)(1)(B) and (C), permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violate. . .Article III of the United States Constitution. 447 US 677, 65 LEd2d 434. . . . While the district court judge alone acts as the ultimate decision-maker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. 447 US 680, 65 LEd2d 436.
>
> . . .Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations 'such weight as their merit commands and the sound discretion of the judge warrants', (citation omitted), that delegation does not violate Article III so long as the ultimate decision is made by the district court.
> *447 US 683, 65 LEd2d 438.*

Unlike the defendant in *Raddatz,* who objected, the Dobeys executed a waiver; hence, this Court could dispose of this petition on the ground of waiver. But to do so would necessarily ignore the Article III analyses of Assistant Attorney General Vinson, the panel opinion in *Woodley, Northern Pipeline, Raddatz, Wharton-Thomas,* and the dissents in the *Woodley* and *Pacemaker en banc* decisions. The *Wharton-Thomas* Court went so far as to relieve the parties from two waivers signed by both counsel:

> In addition to the consent [to proceed before a United States Magistrate] the form contained a separate provision allowing the parties to agree that any appeal would be to a judge of the district court (f.n. omitted). Although counsel for the parties signed both portions of the form, the appeal from the magistrate's judgment was taken directly to this court.
>
> Under ordinary circumstances, a case appealed directly to this court, when the parties had agreed to initial review by a district judge, would be remanded for that disposition. In the matter at hand, however, counsel for both parties represent that they had not intended to appeal to the district judge and erroneously signed the consent to that procedure. Because the procedure is of recent origin and not yet well known to the bar, we will grant the parties' request to set aside the consent to appeal to the district judge.
> *721 F2d 922, 924.*

The maximum penalties provided for violation of 26 USC §7203, a misdemeanor, are one year imprisonment and/or $10,000 fine. Legislative history included in the appendix to this brief reveals that, in 1968, the magistrate's jurisdiction was increased dramatically from the commissioner's, which had been limited to misdemeanors committed on federal enclaves punishable by not more than six months' imprisonment and/or $500.00 fine. Notwithstanding the caveat of Assistant Attorney General Vinson, the magistrate's jurisdiction was extended to misdemeanors wherever committed that were punishable by not more than one year and/or

$1,000.00 fine. Not until the Act of October 10, 1979, did 26 USC §7203 come within a magistrate's jurisdiction: by the removal of the penalty limitations and extension to any and all "misdemeanors committed within that judicial district".

Justice Brennan's opinion in *Northern Pipeline* includes a lengthy discussion of the:

> . . .potential for encroachment upon powers reserved to the Judicial Branch. . . . The broad range of questions that can be brought into a bankruptcy court...is the clearest proof that. . .appellants' analysis fails to provide any real protection against the erosion of Article III jurisdiction. . .
> *458 US 50, 74, 73 LEd2d 598, 617.*

Justice Brennan further takes the appellants to task for their:

> . . .second argument for upholding the constitutionality of the Act: that 'viewed within the entire judicial framework set up by Congress', the bankruptcy court is merely an 'adjunct' to the district court.
> *458 US 50, 77, 73 LEd2d 598, 619.*

A 6-3 majority of the Court rejected the "adjunct" rationale in *Northern Pipeline,* since the Bankruptcy judge there was sitting as trial judge and the district judge possessed only appellate jurisdiction, just like the magistrate and district judge in the case at bar, to determine 1) whether errors of law were made; if so, 2) the nature and extent of any remedy and/or the sufficiency of the evidence to sustain the judgment. See *Northern Pipeline,* supra at 605 f.n. 5 and 624, discussing appellate review. cf. *United States v. Paramount Storage,* 479 F.Supp. 959 (M.D. Fla., 1979); *United States*

v. Glover, 381 F.Supp. 1139 (D.C. Md., 1974); *United States v. Diaz*, 368 F.Supp. 856 (D.C. Ariz., 1973) rev'd on other grounds 499 F2d 113 (CA9, 1974); *United States v. Harris*, 381 F.Supp. 1095 (D.C. Pa., 1974); *United States v. Acri Wholesale Grocery*, 409 F.Supp. 529 (D.C. Iowa, 1976); *United States v. Welsh*, 384 F.Supp. 531 (D.C. Kan., 1974); and, *United States v. Williams*, 220 F.Supp. 556 (D.C. Calif., 1963).

Petitioners' reliance on the adjunct rationale in *Northern Pipeline* is principally based on *Crowell v. Benson*, 285 US 22, 76 LEd 598, 52 S.Ct. 285 (1932) and *Raddatz*. Both of which are quoted *passim* in Justice Brennan's *Northern Pipeline* opinion quoted herein *passim*. *Crowell's* impact on the instant case can be distilled into this portion selected from *Northern Pipeline:*

> But while *Crowell certainly endorsed the proposition that Congress possesses broad discretion to assign fact finding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judical power to adjuncts engaged in the adjudication of rights not created by Congress. Indeed, the validity of this proposition was expressly denied in *Crowell,* when the Court rejected 'the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved', 285 US, at 60-61, 76 LEd 598, 52 S.Ct.285 (emphasis added by the Court in *North-*

> *ern Pipeline)* (f.n. omitted) and stated that 'the essential independence of the exercise of the judicial power of the United States in the enforcement of *constitutional* rights requires that the Federal Court should determine... an issue [of agency jurisdiction] upon its own record and the facts elicited before it.' *Id.*, at 64, 76 LEd 598, 52 S.Ct. 285 (emphasis added by the Court in *Northern Pipeline.*)

CONCLUSION

Petitioners submit that 1) waiver is an inappropriate ground upon which to base subject matter jurisdiction to hear a criminal case in federal court when the trial judge lacks Article III status and 2) the magistrate's jurisdiction to act as trial judge cannot be sustained based on an adjunct rationale. Accordingly, petitioners' convictions and sentences based thereon should be vacated.

RESPECTFULLY SUBMITTED this _____ day of April, 1985.

WILLIAM A. COHAN, P.C.

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APPENDIX

458 US 50, 70-71, 73 L.Ed.2d 598, 615:

25. The "unifying principle" that Justice White's dissent finds lacking in all of these cases, see post, at 105, 73 L.Ed.2d, at 637, is to be found in the exceptional constitutional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary. What clearly remains subject to Article III are all private adjudications in federal courts within the States — matters from their nature subject to "a suit at common law or in equity or admiralty" — and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Article III Branch, these matters lay at what they perceived to be the protected core of that power.

Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Article III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing these cases, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself whether Article III courts are required. See post, at 105-116, 73 L.Ed.2d. at 637-644. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind. See post, at 113, 73 L.Ed.2d at 642.

United States Court of Appeals

For the Tenth Circuit

January 8, 1985

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Nos. 84-1443 & 84-1444
	)	(D.C. No. 83-00053)
v.	)	(District of New Mexico)
	)	
JUANITA M. DOBEY and GLENN DOBEY,	)	
	)	
Defendants-Appellants.	)	

.....

Richard Smith (William L. Lutz, United States Attorney, and Stanley K. Kotovsky, Jr., Assistant United States Attorney, with him on the brief), Assistant United States Attorney, Albuquerque, New Mexico, Attorneys for Plaintiff-Appellee.

William A. Cohan, Denver, Colorado, Attorney for Defendants/Appellants.

Before BARRETT, BREITENSTEIN, and SEYMOUR, Circuit Judges.

BARRETT, Circuit Judge.

Glenn R. and Juanita M. Dobey, husband and wife (the Dobeys), appeal from their convictions of willful failure to file federal income tax returns for 1978 (Count I) and 1979 (Count II) in violation of 26 U.S.C. §7203, a misdemeanor. The Dobeys were convicted after a jury trial before a United States Magistrate and each sentenced to imprisonment of one year on Count I, and placed on probation for five years and fined $2,000.00 on Count II. On appeal, the district court affirmed the judgment and sentence.

Prior to trial the Dobeys executed a consent to proceed before a United States magistrate which provided:

> The United States magistrate has explained to me the nature of the offense(s) with which I am charged and the maximum possible penalties which might be imposed if I am found guilty. The magistrate has also informed me of my right to assistance of legal counsel. The magistrate has also informed me of my right to trial, judgment, and sentencing before a United States district judge.
>
> I HEREBY: Waive (give up) my right to trial, judgment, and sentencing before a United States district judge and I consent to trial, judgment, and sentencing before a United States magistrate.

R., Vol. I at 1.

The Dobeys proceed to trial before the magistrate in accordance with 28 U.S.C. §636(a)(3) and 18 U.S.C. §3401. 28 U.S.C. §636(a)(3) provides:

> (a) Each United States magistrate serving under this chapter shall have within

the territorial jurisdiction prescribed by his appointment--

* * *

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

18 U.S.C. §3401 provides in part:

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

* * *

(f) The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own

> motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General.

It is uncontested that the Dobeys voluntarily consented to be tried by the magistrate and that they voluntarily waived trial before the district court. The Dobeys do not contend that the magistrate failed to adhere to the provisions of 18 U.S.C. §3401 in informing them of their right to trial before the district court. On appeal the Dobeys' sole allegation of error is that the statutes, §§636 and 3401, purportedly conferring criminal trial jurisdiction on the magistrate, violate Article III of the United States Constitution. Thus, they argue, the trial court lacked jurisdiction and their convictions are void.

The Dobeys contend that neither they nor their trial counsel were aware that magistrates lacked the attributes of Article III judges; that their waiver was insufficient to bestow subject matter jurisdiction on the trial court when it lacked Article III status; and that the magistrate's jurisdiction to act as a trial judge cannot be sustained based on an adjunct rationale.

The Government responds that §§636 and 3401 are constitutionally valid and not in violation of Article III because the magistrate must be specifically designated by the district court to conduct a trial and a defendant must consent, in writing, to be tried before the magistrate. The constitutionality of the magistrate's designation is enhanced, according to the Government, by the fact that §3401 also allows the district court, upon its own motion or upon petition by the Government, to remove the case from the magistrate and transfer it to the district court. Lastly, the Government argues that

the Supreme Court has repeatedly recognized a defendant's prerogative to waive fundamental, constitutional rights and that "It follows, that a defendant may waive his right to trial by an Article III judge, provided the defendant has knowingly and voluntarily done so." (Brief of Appellee at 10.)

Both parties cite to *Pacemaker Diagnostic Clinic of America v. Instromedix,* 725 F.2d 537 (9th Cir. 1984) U.S. App. Pdg. In *Pacemaker,* the court, sitting *en banc,* reversed an earlier three-judge opinion (712 F.2d 1305 (9th Cir. 1983)), and held that the constitutional right of parties in a federal forum to have their cause determined by an Article III judge is personal to the parties and may be waived. The court there observed:

> In recent cases, the Supreme Court has not had to consider the constitutional implications of consent by the parties to go before a non-Article III judge, because in none did all parties consent to such a procedure. *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.ed.2d 598 (1982); *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Palmore v. United States,* 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); *Glidden Co. v. Zdanok,* 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962). Significantly, in the Court's latest interpretation [*Northern Pipeline*] of Article III, all the Justices, although not forced to confront the issue squarely, indicated that consent is important to the constitutional analysis. . . .
>
> The Supreme Court has allowed criminal defendants to waive even fundamental rights: the right to be free from self incrimination, *Garner v. United States,* 424 U.S. 648, 96 S.Ct.

> 1178, 47 L.Ed.2d 370 (1976), the right to counsel, *Adams v. United States ex rel. McCann,* 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), the right to be free from unreasonable searches and seizures, *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the right to a speedy trial, *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the right to a jury trial, *Duncan v. Louisiana,* 391 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968), and even, by pleading guilty, the right to trial itself. *See Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). We refuse to reach the anomalous result of forbidding waiver in a civil case of the personal right to an Article III judge.

725 F.2d at 542-43.

The *Pacemaker* court concluded that, whereas a mandatory provision for trial by magistrates rather than Article III judges would violate the constitutional rights of parties in a federal forum to have their cause determined by an Article III judge, once a party freely and voluntarily consents to proceed to trial before a magistrate and waives his constitutional right to have his cause determined by an Article III judge, the party's consent overcomes any constitutional objections.

Similarly in *Collins v. Foreman,* 729 F.2d 108 (2nd Cir. 1984), the court held that the statutes (§§636 and 3401) authorizing magistrates to try civil cases and enter final judgment upon consent of the parties did not violate Article III's prohibition of delegation of judicial power because §3401 required that the magistrate be specifically designated to exercise such jurisdiction by the district court whereby the appointment and removal of the magistrate was entrusted to the district court.

Within *Collins* the court also recognized the inherent right of a litigant to waive his right to trial before an Article III judge:

> We find that to the extent that litigants may have a due process right to appear before an Article III judge in a civil case, they may freely waive that right. Indeed, the Supreme Court has held that important constitutional rights may be waived even in criminal cases, which generally raise more troubling due process problems.

729 F.2d at 120.

See also Lehman Brothers Kuhn Loeb Incorporated v. Clark Oil & Refining, 739 F.2d 1313 (8th Cir. 1984) (the action of a properly designated magistrate in proceeding to trial with the consent of the parties is not unconstitutional as violative of due process or separation of powers).

Applying these decisions to the facts herein, we hold that Dobeys' trial before the magistrate was not in violation of Article III. As set forth, *supra*, it is uncontested that the Dobeys voluntarily consented to trial before the magistrate and knowingly waived their right to trial before the district court. Furthermore, nothing in the record indicates that the magistrate who presided over the Dobeys trial was acting outside the scope of his designated jurisdiction. Inasmuch as the Dobeys consented to trial before a specifically designated magistrate and knowingly waived their right to trial before an Article III judge, their convictions are not void for lack of jurisdiction.

AFFIRMED

JANUARY TERM

February 11, 1985

Before William J. Holloway, Jr., Honorable Jean S. Breitenstein, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUANITA M. DOBEY and GLENN R. DOBEY, Defendants-Appellants	)	Nos. 84-1443 & 84-1444

This matter comes on for consideration of appellants petition for rehearing and suggestion for rehearing in banc in the captioned appeals.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

Office - Supreme Court, U.S.
FILED
JUN 17 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1683

In the Supreme Court of the United States

OCTOBER TERM, 1984

GLENN R. DOBEY, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1683

GLENN R. DOBEY, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401, which authorize federal magistrates to conduct trials and enter judgments in misdemeanor prosecutions if the defendant consents, violate Article III of the Constitution.

1. Petitioners, husband and wife, were charged with two misdemeanor counts of willful failure to file their individual federal income tax returns for the years 1978 and 1979, in violation of 26 U.S.C. 7203. Prior to trial, petitioners executed written forms consenting to having the case tried by a United States magistrate.[1] Following a jury trial before a

[1]The forms provided as follows (Pet. App. 5a):

> The United States magistrate has explained to me the nature of the offense(s) with which I am charged and the maximum possible penalties which might be imposed if I am found guilty. The

magistrate in the United States District Court for the District of New Mexico, petitioners were found guilty on both counts, and each was sentenced to one year's imprisonment on the count relating to the year 1978 and placed on five years' probation and fined $2,000 on the count relating to the year 1979. Pet. App. 5a.

Petitioners appealed their convictions to the district court (see 18 U.S.C. 3402) on Fifth Amendment grounds unrelated to the question presented in the petition. The district court affirmed. Petitioners then appealed to the court of appeals, asserting that the statutes providing for a consensual reference to the magistrate violate Article III of the Constitution. The court of appeals rejected that contention and affirmed their convictions (Pet. App. 4a-10a).

2. 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401 authorize federal magistrates to conduct trials and enter judgments in misdemeanor prosecutions if the defendant consents. In *Byers* v. *United States,* cert. denied, No. 84-5120 (Oct. 29, 1984), and *Jenkins* v. *United States,* cert. denied, No. 84-5123 (Feb. 19, 1985), this Court declined to review the question whether these statutes violate Article III of the Constitution. This question is no more worthy of review in this case.

As we explained in our brief in opposition in *Byers* (at 6-7), 18 U.S.C. 3401 is the counterpart to 28 U.S.C. 636(c), which permits civil cases to be referred to magistrates with the consent of the parties. Every court of appeals that has

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magistrate has also informed me of my right to assistance of legal counsel. The magistrate has also informed me of my right to trial, judgment, and sentencing before a United States district judge.

I HEREBY: Waive (give up) my right to trial, judgment, and sentencing before a United States district judge and I consent to trial, judgment, and sentencing before a United States magistrate.

considered the question has upheld the constitutionality of 28 U.S.C. 636(c), and this Court has consistently denied certiorari. See 84-5120 Br. in Opp. 6.[2]

Petitioners do not appear to attempt to distinguish between the consensual reference of civil trials to magistrates and the consensual reference of misdemeanor prosecutions, and as we demonstrate in our brief in opposition in *Byers* (at 7), no such distinction would be valid. Criminal defendants, like civil litigants, may waive the right to a trial altogether. See, *e.g., Brady* v. *United States,* 397 U.S. 742, 748 (1970). Petitioners concede (Pet. 3, 5, 26) that they executed written consents that, by their express terms, waived their right to "trial, judgment, and sentencing before a United States district judge" in this case.[3] Article III does not establish an unwaivable barrier to the trial of a criminal case before a magistrate, any more than it precludes the consensual trial of civil cases by magistrates: the text of

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[2]We have served on petitioners' counsel a copy of our brief in opposition in *Byers,* as well as a copy of our brief in opposition in *Foreman* v. *Collins,* cert. denied, No. 83-1616 (Oct. 1, 1984), where we explain why the question whether 28 U.S.C. 636(c) is constitutional does not merit this Court's review.

[3]Although petitioners concede that "this Court could dispose of this petition on the ground of waiver" (Pet. 26), elsewhere in the petition (at 5-9) petitioners appear to claim that their waiver was ineffective because the magistrate did not explain the difference between a magistrate and an Article III judge. Petitioners did not raise this argument in their brief before the court of appeals, and it is without merit. 18 U.S.C. 3401(b) requires that a magistrate "carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court * * *." Petitioners certified that they received such an explanation before consenting to trial by a magistrate. Petitioners were free to seek advice from counsel on the potential differences between a trial by a magistrate and trial by a judge, and they cite no authority for the proposition that the magistrate was obligated to "advise[] the[m] * * * of Article III" (Pet. 8) or provide a detailed legal explanation of the differences between magistrates and judges.

Article III does not distinguish between civil and criminal litigation, and this Court has specifically ruled that "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts" (*Swain* v. *Pressley,* 430 U.S. 372, 382-383 (1977) (footnote omitted)). See also *Palmore* v. *United States,* 411 U.S. 389, 400, 402, 407 (1973).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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